Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition of BellSouth Corporate	)	
For Forbearance from	)	
The Prohibition of Sharing Operating,	)	CC Docket No. 96-149
Installation, and Maintenance Functions	)	
Under Section 53.203(a)(2)-(3) of the	)	
Commission's Rules	)	
	)	

REPLY COMMENTS OF THE
UNITED STATES TELECOM ASSOCIATION

The United States Telecom Association (USTA),[1] through the undersigned and pursuant to the *Public Notice* released by the Federal Communications Commission's (FCC's or Commission's) Wireline Competition Bureau (WCB)[2] and pursuant to sections 1.415 and 1.419 of the Commission's rules,[3] hereby submits its reply comments on the Petition of BellSouth Corporation for Forbearance from the Prohibition of Sharing Operating, Installation, and Maintenance Functions Under Section 53.203(a)(2)-(3) of the Commission's Rules (Petition). In these reply comments, USTA responds to comments filed by other interested parties. USTA also continues to urge the Commission to rescind its operating, installation, and maintenance (OIM)

[1] USTA is the Nation's oldest trade organization for the local exchange carrier industry. USTA's carrier members provide a full array of voice, data and video services over wireline and wireless networks.

[2] *Public Notice*, CC Docket No. 96-149, DA 03-2340 (rel. July 16, 2003) soliciting comment on BellSouth's Petition for Forbearance Under Section 10 of the Communications Act, as amended, From the Prohibition of Sharing Operating, Installation, and Maintenance Functions.

[3] 47 C.F.R. §§1.415 and 1.419.

rules,[4] but if the Commission does not agree to do so, USTA again urges the Commission to forbear from requiring compliance with its OIM rules.

DISCUSSION

As USTA maintained in its comments, the Telecommunications Act of 1996 (1996 Act) does not mandate the Commission's implementation of its rules prohibiting the sharing of OIM services between a Bell operating company (BOC) and its Section 272 separate long distance affiliate.[5] Contrary to the claims of Sprint that the OIM structural safeguard is compelled by the 1996 Act[6] and the claims of AT&T that Section 272 precludes the sharing of OIM services by BOCs and their Section 272 affiliates,[7] Section 272(b) of the 1996 Act, which sets forth the structural and transactional requirements of Section 272 affiliates, does not identify any limitations on OIM sharing between BOCs and their affiliates. Congress certainly knew how to include such limitations because it did so in Section 274(b) of the 1996 Act, which sets forth the structural and transactional requirements for the relationship between BOCs and their electronic publishing affiliates regarding the provision of electronic publishing by these affiliated companies. Specifically in this regard, Section 274(b)(7) prohibits BOCs from "hiring or training of personnel on behalf of a separated affiliate" and prohibits BOCs from "purchasing, installation, or maintenance of equipment on behalf of a separated affiliate."[8] If Congress had intended to prohibit the sharing of OIM services between BOCs and their Section 272 affiliates, it would have expressly stated so in Section 272 as it did in Section 274. In the absence of an

[4] *See* 47 C.R.F. §§53.203(a)(2) and (3).

[5] *See* USTA Comments at 2-3.

[6] *See* Sprint Comments at 3.

[7] *See* AT&T Comments at 2-3.

[8] *See* 47 U.S.C. §274(b)(7).

express prohibition against the sharing of OI&M services in Section 272, there is a statutory presumption that such activities are permissible. Accordingly, the Commission is not statutorily prohibited from eliminating its OIM rules. For these reasons, and as advocated in its comments, USTA urges the Commission to rescind its OIM rules. If the Commission does not rescind these rules, USTA urges the Commission to forbear from requiring compliance with these rules.

Certain commenters claim that the sharing of OIM functions by BOCs and their Section 272 affiliates would create substantial opportunities for improper cost allocation, which would result in unjust and unreasonable rates,[9] and that the OIM rules are necessary to prevent cross-subsidization, noting that even under a price-cap regime a BOC can exploit its dominance in the local and exchange access markets to subsidize its entry into the long distance market, consolidate its dominant position, frustrate competition, and harm consumers.[10] These claims are simply not true. BellSouth notes that the public availability of affiliate transactions as well as the requirement to comply with the cost accounting rules and imputation standards of Section 272, along with requirements to maintain separate books and be subject to audits, will ensure proper cost allocation between BOCs and their Section 272 affiliates.[11] BellSouth adds that "even in the unlikely event that costs were improperly allocated to the BOC, rates would not be impacted, because the price cap system has broken the link between costs and rates."[12] More specifically, under a price-cap regime BOCs have no ability to manipulate prices, by inserting costs, in an attempt to engage in cross subsidization because their prices are set by formula. Any changes to those prices, such as inclusion of exogenous costs, must be approved by the

[9] *See* MCI Comments at 3-4.

[10] *See* Sprint Comments at 9-10.

[11] *See* Petition at 5-6.

[12] *See* Petition at 5.

Commission. There is no evidence that removal of the OIM rules could or would result in cost misallocation by BOCs.

Certain commenters also claim that there is no basis for finding that the OIM sharing prohibition is not necessary to prevent BOCs from discriminating against unaffiliated long distance carriers.[13] More specifically, they claim that BellSouth has provided no basis for the Commission to reconsider its previous findings in which they prohibited BOCs from sharing OIM functions with their Section 272 affiliates.[14] Certainly adequate regulatory protections already exist to protect against discrimination, notably Sections 202, 251, and 272, but there is also protection against discrimination in market forces. The telecommunications market for both local and long distance services is competitive. Consumers today have many choices for all their telecommunications needs. They can obtain local and long distance services from cable telephony providers, wireless service providers, Internet telephony providers, competitive local exchange carriers (CLECs), and a multitude of interexchange carriers (IXCs). It is this significant change in the market following the implementation of the 1996 Act and since the Commission last considered the matter of BOCs sharing their OIM functions with their Section 272 affiliates that provides a new basis for reconsidering the Commission's past prohibition on such sharing. Taking into consideration such competition in the market today, the Commission should rescind its OIM rules or at least forbear from enforcing them.

Some commenters attempt to minimize BellSouth's claim that the OIM rules have resulted in a competitive disadvantage to BOCs as a result of the imposition of duplicative costs for functions that could be more efficiently handled through integrating the BOCs' OIM

[13] *See* Sprint Comments at 7 and MCI Comments at 4.

[14] *Id*.

functions with those of their Section 272 affiliates.[15] Yet, these comments fail to acknowledge the reality that many companies that offer both local and long distance services, particularly companies like Sprint, MCI, and AT&T, do so by integrating functions similar to those at issue in this proceeding. Unlike the BOCs and their long distance affiliates, these CLECs and their affiliated IXCs are only limited in their ability to offer seamless, integrated local and long distance services by their ability to win customers for both of those services. More importantly, these commenters have focused too narrowly on a comparison of BOCs and their affiliated long distance companies with their wireline competitors (*i.e.*, wireline long distance companies and CLECs). The fact is that BOCs and their long distance affiliates face stiff competition from wireless carriers and growing competition from cable telephony and Internet telephony providers, none of which are limited in their ability to offer seamless, integrated local and long services. The competitive market for integrated local and long distance services is simply much larger than those service offered by BOCs, their long distance affiliates, and their wireline competitors.

Several commenters argue that the forbearance BellSouth seeks is subject to Section 10(d) of the Communications Act of 1934, as amended (Act), because Section 272 relates to services for which a BOC must obtain authorization under Section 271(d)(3) and they thereby conclude that the Commission cannot forbear from Section 272 requirements until all the requirements of Section 271 have been "fully implemented."[16] These commenters blatantly misrepresent the requirements of the Act. Section 10(d) states, "except as provided in section 251(f), the Commission may not forbear from applying the requirements of section 251(c) or 271

[15] *See* Sprint Comments at 12, MCI Comments at 5-6, and AT&T Comments at 8-9.

[16] *See* MCI Comments at 1, AT&T Comments at 3-4, and Sprint Comments at 2.

under subsection (a) of this section until it determines that those requirements have been fully implemented."[17] Congress could have limited the Commission's ability to forbear from the requirements of Section 272 by including Section 272 in the limitations of Section 10(d), but it did not. The Commission's decision of whether or not to forbear from requiring the OIM rules, which it interpreted as being necessary pursuant to Section 272(b), should not be made pursuant to the limitations of Section 10(d), rather it should be based on the requirements of Section 10(a).

At least one commenter claims that the Commission must find that forbearance from a regulation will affirmatively promote competitive market conditions as a prerequisite to finding that the Section 10(a)(3) public interest requirement has been met before it can forbear from such regulation.[18] As its authority, this commenter cites to only a portion of Section 10(b) of the Act, which requires the Commission to "consider whether forbearance from enforcing the provision or regulation will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services."[19] The conclusion this commenter draws from its reliance on only a portion of Section 10(b) is simply a misreading of the Act. The remainder of Section 10(b) states "if the Commission determines that such forbearance will promote competition among providers of telecommunications services, that determination *may* be the basis for a Commission finding that forbearance is in the public interest."[20] Interestingly, it is forbearance from the Section 272 OIM rules that will promote

[17] 47 U.S.C. §160(d).

[18] *See* Americatel Comments at 3. In its comments, Sprint infers that the Commission's discretion regarding forbearance is limited by the requirement in Section 10(b) of the Act that the Commission consider whether forbearance will promote competitive market conditions. *See* Sprint Comments at 4-5.

[19] *See* 47 U.S.C. §160(b).

[20] *Id* (emphasis added).

competitive market conditions by enhancing competition among providers of telecommunications services. No other providers – not cable telephony providers, Internet telephony providers, CMRS providers, or CLECs and their IXC affiliates – have separation requirements similar to those imposed on BOCs. Rescinding the OIM rules, or forbearing from applying these rules, would put BOCs and their Section 272 affiliates on an equal competitive footing with their competitors and would thereby foster competition.

One commenter maintains that the relief sought by BellSouth is premature in light of the Commission's broader proceeding on the regulatory classification of BOCs and independent ILECs that offer integrated local and long distance services[21] and that if the relief requested in this OIM forbearance proceeding is granted it would prejudge the outcome in that broader Regulatory Classification Proceeding, possibly making it more difficult or impossible for the Commission to later impose additional safeguards.[22] The BellSouth Petition addresses one small part – the regulatory treatment of BOCs that want to share their OIM functions with their Section 272 affiliates – of the broader Regulatory Classification Proceeding before the Commission. Granting forbearance of the OIM rules in this proceeding in no way predetermines how the Commission can or will act with regard to the regulatory classification of BOCs and ILECs that offer integrated local and long distance services.

Finally, two commenters argue that BellSouth remains dominant in the local and exchange access markets; that BellSouth possesses market power in these markets; and that BellSouth can and does exercise this power to discriminate against competitors, particularly long

[21] *See Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements* and *2000 Biennial Regulatory Review Separate Affiliate Requirements of Section 64.1903 of the Commission's Rules*, Further Notice of Proposed Rulemaking, WC Docket No. 02-112 and CC Docket No. 00-175, FCC 03-111 (rel. May 19, 2003) (Regulatory Classification Proceeding).

distance rivals, by raising costs.[23] As USTA has commented before in the Regulatory Classification Proceeding, "it is absurd to think that BOCs or independent ILECs have any ability in today's competitive telecommunications market to leverage an advantage in the long distance market."[24] More specifically, customers can and do easily bypass the local and exchange access facilities and services of BOCs and independent ILECs by purchasing bundled local and long distance services from wireless providers, CLECs, cable telephony providers, and Internet telephony providers.[25] These commenters have failed to demonstrate that BellSouth or any other BOC is exercising market power, which would warrant continuation of the Commission's OIM rules for BOCs and their Section 272 affiliates.

If the Commission determines that it must proceed with a forbearance analysis rather than simply rescind its OIM rules, USTA urges the Commission to find that the OIM rules are not necessary to prevent discrimination; that they are not necessary to protect consumers; that forbearance would promote competition; and that these findings support a further finding that forbearance would be in the public interest. As stated in its comments, USTA noted that several provisions in the Act,[26] including many that will survive any sunset of Section 272, prohibit discrimination. In addition, the continued enforcement of Section 272(b)(2) imposes duplicative costs on BOCs and their long distance affiliates, resulting in higher costs to consumers, which hurts consumers rather than helps them. Finally, the continued enforcement of Section 272(b)(2) unnecessarily limits the ability of BOCs and their long distance affiliates to compete with their

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[22] *See* Americatel Comments at 2, 4-5.

[23] *See* AT&T Comments at 5-7 and Sprint Comments at 5-6.

[24] Regulatory Classification Proceeding, USTA Comments at 3.

[25] *See id*. at 6-8.

[26] *See* 47 C.F.R. §§272(b)(2)-(5), 272(e)(3), 202, and 251.

wireline CLEC, wireless, cable telephony, and Internet telephony competitors in offering seamless, integrated, end-to-end local and long distance services. For these reasons, USTA urges the Commission to grant BellSouth's forbearance petition.

Respectfully submitted,

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August 20, 2003

CERTIFICATE OF SERVICE

I, Meena Joshi, do certify that on August 20, 2003, the afore-mentioned Reply Comments of The United States Telecom Association was electronically mailed to the following parties.

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